

DANIEL G. BOGDEN
United States Attorney
ERIC JOHNSON
Chief, Criminal Division
JAMES M. TRUSTY
Chief, Organized Crime &
Racketeering Section
RONALD CHENG
Special Attorney
1200 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-8644
Facsimile: (213) 894-8601
e-mail: ronald.cheng@usdoj.gov

Attorneys for Plaintiff
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHAOFAN XU

(also known as YAT FAI HUI),

GUOJUN XU

(also known as KIT SHUN HUI),

WAN FANG KUANG

(also known as WENDY KUANG),

and

YING YI YU,

Defendants.

No. 2:02-cr-00674-PMP-LRL

GOVERNMENT'S RESENTENCING
POSITION FOR DEFENDANTS
CHAOFAN XU, GUOJUN XU, WAN
FANG KUANG, AND YING YI YU
(DEFENDANTS NOS. 1 THROUGH
4); MEMORANDUM OF POINTS AND
AUTHORITIES

Date: October 28, 2013

Time: 9:00 a.m.

Plaintiff United States of America, by and through its
counsel of record, the United States Attorney for the District

1 of Nevada and Special Attorney (Department of Justice, Organized
2 Crime and Gang Section) Ronald Cheng, hereby files its
3 Resentencing Position for Defendants Chaofan Xu, Guojun Xu, Wan
4 Fang Kuang, and Ying Yi Yu (Defendants Nos. 1 Through 4).

5 The government's position is based upon the attached
6 memorandum of points and authorities and declaration of Ronald
7 Cheng, as well as the concurrently filed Submission of the
8 Declaration of Ronald Cheng and Exhibits in Support of
9 Resentencing Position for Defendants Chaofan Xu, Guojun Xu, Wan
10 Fang Kuang, and Ying Yi Yu, and Resentencing Position Regarding
11 Restitution for Defendants Chao Fan Xu, Guo Jun Xu, Wan Fang
12 Kuang, and Ying Yi Yu.
13
14

15 Dated: October 2, 2013

Respectfully submitted,

16 DANIEL G. BOGDEN
17 United States Attorney

18 ERIC JOHNSON
19 Chief, Criminal Division

20 JAMES M. TRUSTY
21 Chief, Organized Crime &
22 Gang Section

23 /s/
RONALD CHENG
Special Attorney

24 Attorneys for Plaintiff
25 UNITED STATES OF AMERICA

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1 described in its concurrently filed position regarding
2 restitution.

3 **II. FACTUAL AND PROCEDURAL BACKGROUND**

4 A. The Offense Conduct¹

5 As the Court is familiar through the evidence at trial, as
6 well as the filings that include the government's trial
7 memorandum (CR 506), response to defendants' trial motions for
8 judgments of acquittal (CR 655), and the government's original
9 sentencing papers (e.g., CR 720, 737 (for defendant Chaofan)),
10 as well as the Ninth Circuit opinion, 706 F.3d at 972-74,
11 defendants engaged in a scheme to embezzle hundreds of millions
12 of dollars from the Bank of China ("BOC"), transport substantial
13 amounts of those funds to the United States, and enjoy those
14 proceeds in this country through obtaining U.S. immigration
15 status by fraud.
16

17
18
19 ¹ The following factual statement is based upon the
20 government's answering brief filed in defendants' appeals.
21 Citations to the record are provided for those portions that
22 bear on the issue regarding calculation of loss discussed below.
23 Given the volume of documents, it is not possible to include
24 copies of all documents cited, but copies of documents relating
25 to loss to BOC and to transfers to the United States are
26 attached to the concurrently filed declaration of Ronald Cheng.
27

28 In the government's concurrently filed resentencing
position regarding restitution, the government also addresses
the objections made by defendants Chaofan and Kuang to their
Pre-Sentence Reports at the original sentencing (CR 726, 736),
including relevant citations to the trial record and other
materials.

1 Defendants Chaofan and Guojun, as well as Zhen Dong Yu,
2 served as heads of the BOC Kaiping sub-branch in the 1990s and
3 exploited the auditing controls at the bank to cover
4 unauthorized foreign exchange speculation and engage in
5 fraudulent loans involving local Kaiping businesses. The three
6 diverted a large amount of the proceeds to Ever Joint, which was
7 a conduit company in Hong Kong. From Hong Kong, the three men,
8 with their spouses, defendants Kuang (Chaofan's wife) and Ying
9 Yi Yu (Guojun's wife), as well as Xu Hui Yu (Zhen Dong Yu's
10 wife), lived in luxury apartments and took extravagant gambling
11 trips to various destinations, including Las Vegas. In the
12 course of the scheme, each member of the group entered into a
13 fraudulent marriage with a fake spouse holding United States
14 immigration status, with the goal of escaping to the United
15 States should the scheme be discovered. In October 2001, the
16 BOC discovered the massive deficit in their records, and
17 defendants fled to the United States, where they remained until
18 their arrests in this case.

20 1. The Gambling Trips

21 The three bank managers and their spouses traveled to
22 Macao, Australia, Malaysia, the Philippines, and Las Vegas to
23 gamble. (RT [2/25/08] 192-94; RT [8/14/08 a.m.] 57-64).² In
24 2000 and 2001, the three managers applied for United States
25

26 ² "RT" refers to the Reporter's Transcript, followed by the
27 date of the proceeding and the page number. "Ex." refers to the
28 exhibits at trial, followed by the exhibit number.

1 visas in false names that they had previously used for purposes
2 of their fraudulent marriages. (RT [9/19/05] 45-59; [8/19/08
3 a.m.] 77-87; Exs. 11, 126-131, 135). Defendant Chaofan and
4 Guojun used those visas to enter this country on October 2,
5 2001. (Ex. 135). The managers, together with their spouses on
6 later occasions, flew to Las Vegas for gambling excursions. (RT
7 [9/19/05] 45-59, 63-64; Ex. 135).

8 In Las Vegas, the group stayed primarily at Caesar's
9 Palace, where they received VIP services, including the top-
10 floor suite of a hotel tower. (RT [2/25/08] 178-79, 183-92;
11 [8/14/08 a.m.] 59-60; [8/15/08] 6-16, 53-54). Defendants
12 Chaofan and Guojun used visas in their false names at the
13 Bellagio, and defendants Kuang and Ying Yi Yu used the passports
14 they had obtained based on the false marriages described above.
15 (RT [2/25/08] 180-81; [8/11/08] 100-13; Exs. 180(1), 181(14)).
16 Defendants Kuang and Ying Yi Yu also used their passports at the
17 Paris casino. (Exs. 179(2), 179(4)). The game of preference
18 was baccarat, and all four defendants, along with Zhen Dong Yu
19 and Xu Hui Yu, gambled at the casinos. (RT [2/25/08] 188-92;
20 [8/15/08] 6-59, 209-24; Exs. 181(1)-181(25), 183).

21 The money for gambling was delivered through
22 intermediaries, including Wa Po Kwong, who was defendant Kuang's
23 brother, and a gambling agent, Hon Chee Wong. The group
24 typically brought in cashier's checks to establish a "front
25 money" account, that is, a credit line. (RT [2/25/08] 192;
26 [8/11/08] 113-22; [8/12/08 p.m.] 241-48; [8/15/08] 18-24, 50-59,
27
28

1 209-24; [8/20/08 p.m.] 206; Exs. 180(2)-180(6), 181(7), 181(20)-
2 181(23), 183, 244). The transfers attributable to Ever Joint,
3 defendant Chaofan, or defendant Guojun included a set of checks,
4 dated September 30, 2000, and totaling \$2,000,000 payable to Wa
5 Po Kwong and a separate \$600,000 check payable to Hon Chee Wong
6 that were used as credit at the Bellagio casino, after which
7 checks were issued to the members of the group. (RT [8/11/08]
8 113-16; Exs. 180(2), 244).

9
10 For Caesar's Palace, from February 1999 to October 2001,
11 defendants Chaofan and Guojun, as well as Zhen Dong Yu and an
12 associate of Wa Po Kwong, brought checks, some of which were
13 from the Bellagio activity described above and other casino
14 activity, to serve as "front money" for their play. (RT
15 [8/15/08] 21-29, 50-59; Ex. 181(7), 181(20), 181(21), 181(22),
16 181(23)). Defendant Chaofan lost \$6 million in various trips to
17 Caesar's Palace from September 2000 to October 2001, with
18 baccarat wagers as high as \$100,000 a hand; defendant Guojun
19 lost approximately \$500,000 during those trips; defendant Kuang
20 won approximately \$50,000; and defendant Ying Yi Yu lost
21 approximately \$450,000. (RT [8/15/08] 30-40; Ex. 181(8),
22 181(9), 181(11), 181(13); 181(15)).

23 During a trip to Las Vegas in May 2001, Chaofan and Guojun
24 arranged a flight to Los Angeles International Airport to
25 complete paperwork for their fraudulent marriages with their
26 fake spouses at the airport restaurant. (RT [7/18/08] 197-204;
27 [7/22/08] 17-22, 108-13; [8/25/08] 42-49; Exs. 118, 119).
28

1 2. The 2001 Audit

2 In 2001, due to a change in auditing reporting methods, the
3 BOC headquarters and provincial branches directly reviewed
4 balances and sent directions to the second-level branches and
5 sub-branches that they supervised. On October 12, 2001, the
6 Guangdong provincial branch discovered a \$482 million
7 discrepancy in the interbranch account, and this discrepancy was
8 attributable to the Kaiping sub-branch, which was managed at
9 that time by defendant Guojun. (RT [6/11/08] 87-89; RT
10 [6/27/08] 33-37). As further discussed in the concurrently
11 filed government's restitution position, an audit identified and
12 documented the components of the loss that totaled \$482 million.
13

14 3. The Flight to the United States

15 In October 2001, after a gambling trip to Las Vegas, the
16 group returned to Los Angeles, and defendants Chaofan and
17 Guojun, along with Zhen Dong Yu, went back to China. (RT
18 [8/14/08 a.m.] 65-66). Afterwards, defendant Chaofan told Zhen
19 Dong Yu that the fraud had been discovered. (RT [9/20/05] 118-
20 19). Defendants Chaofan and Guojun, as well as Zhen Dong Yu,
21 were in Kaiping, and they fled to Hong Kong. (RT [9/20/05] 118-
22 19).

23 In Hong Kong, Zhen Dong Yu sent wire transfers of \$3.5
24 million to his brother in San Francisco, \$1 million to an
25 acquaintance in Canada, and \$1.1 million to the Hong Kong office
26 of Caesar's Palace, and also obtained a \$1.2 million cashier's
27 check for himself. (RT [9/20/05] 122-25; [8/19/08 a.m.] 111-12;
28

1 Ex. 17). Defendants Chaofan and Guojun also made wire
2 transfers. (RT [9/20/05] 124-25). These funds from Hong Kong
3 were connected to money stolen from BOC. (RT [9/20/05] 120-21).
4 Zhen Dong Yu carried on his person the \$1.2 million check, and
5 defendant Guojun carried approximately \$700,000 to \$800,000 in
6 checks. (RT [2/25/08] 172-74).

7 The three managers, along with the gambling agent, flew
8 from Hong Kong to Vancouver on October 15, 2001, where they
9 entered using documents with their false names. (RT [9/20/05]
10 125-26; [2/25/08] 169-74). After arriving in Canada, defendants
11 Chaofan and Guojun flew on a Caesar's casino jet to Las Vegas to
12 gamble and to obtain cash. (RT [9/20/05] 126-27; [2/25/08] 200-
13 01; [8/15/08] 184-90; [8/19/08 a.m.] 126-27; Ex. 182). In doing
14 so, they used the visas in the false names of Yat Fai Hui and
15 Kit Shun Hui to enter the country. (Exs. 135). The three had
16 wired a total of over \$8 million to Caesar's Palace, but
17 defendants Chaofan and Guojun discovered that the transfers had
18 been frozen. (RT [2/25/08] 201-03; [8/15/08] 184-90).

20 In the meantime, Zhen Dong Yu's true spouse (Xu Hui Yu) and
21 fake spouse (Shanna Ma) flew to Hong Kong to collect belongings
22 and to meet Kuang and Ying Yi Yu (along with their children) and
23 fly from Hong Kong to Vancouver. With the assistance of a
24 lawyer and paralegal who had arranged Zhen Dong Yu's false
25 marriage and the marriages at Los Angeles International Airport
26 that were described above, defendants, along with Zhen Dong Yu
27
28

1 and his spouse and all the defendants' children, entered the
2 United States.

3 4. The Arrests and Evidence Discovered in Searches

4 The group initially stayed in the Los Angeles area, but
5 defendants Chaofan, Guojun, Kuang, and Ying Yi Yu moved to
6 Wichita, Kansas, with defendants Chaofan and Kuang subsequently
7 moving to Edmond, Oklahoma. Zhen Dong Yu was arrested in Los
8 Angeles on December 19, 2002, and pleaded guilty to federal
9 charges and agreed to return to China, where he was convicted of
10 embezzlement and illegal use of state property and sentenced to
11 12 years imprisonment. Xu Hui Yu also pleaded guilty to a
12 federal offense of marriage fraud, but was not required to
13 return to China.
14

15 Law enforcement arrested defendants Guojun and Ying Yi Yu
16 in Wichita, Kansas, on September 22, 2004. Law enforcement
17 arrested defendants Chaofan and Kuang near their residence in
18 Edmond, Oklahoma, on October 6, 2004. Defendant Chaofan, who
19 initially identified himself as "Johnny Hui," tried to run away
20 after being handcuffed. Defendant Kuang, after she had been
21 arrested and placed in a police car, spoke with a neighbor and
22 told her, in a Chinese-language conversation that was recorded
23 within the police car, to go get the money from the refrigerator
24 and storage cabinet or else "they will go search for it." On
25 executing a search warrant for the residence, law enforcement
26 discovered, among other things, jewelry and cash totaling
27 \$154,000, including \$20,000 hidden in a freezer in the garage,
28

\$20,000 to 30,000 in a kitchen pantry, \$20,000 in a bathroom vanity cupboard, \$30,000 in the kitchen refrigerator, and \$10,010 in a bag in the master bedroom closet.

B. The Original Sentencings

Defendants were convicted of all of the racketeering, international transport of stolen money conspiracy, money laundering conspiracy, and immigration fraud charges against them. The Court determined the Guideline offense level based on the following calculations:

DESCRIPTION			LEVELS
Base offense level (based on cross-reference to § 2B1.1 (§ 2S1.1(a)(1)(A)))	Base (§ 2B1.1(a)(2))	6	40
	Loss (\$482 million) (§ 2B1.1(b)(1)(P))	30	
	Relocating to another jurisdiction, scheme from outside the United States, sophisticated means (§ 2B1.1(b)(9))	2	
	Deriving more than \$1 million from financial institution (§ 2B1.1(b)(13)(A))	2	
	SUBTOTAL	40	
Conviction under 18 U.S.C. § 1957 (§ 2S1.1(b)(2)(A))			1
NET OFFENSE LEVEL FOR			41 (324 to

DESCRIPTION	LEVELS
DEFENDANTS KUANG AND YING YI YU	405 months)
Role	4 (Chaofan) / 3 (Guojun)
Abuse of position of trust	2 (Chaofan and Guojun)
NET OFFENSE LEVEL FOR DEFENDANTS CHAOFAN AND GUOJUN	43 (maximum under Guideline table)

After making these findings, the Court determined under 18 U.S.C. § 3553(c) that, balancing the need for a "severe penalty" with sentencing disparity in view of the 12-year sentence that codefendant Zhen Dong Yu received, there should be a variance downward from the Guideline term of 65 years imprisonment (the statutory maximum applicable for the Guideline range of life imprisonment) and imposed sentences of 300 months' imprisonment for Chaofan and 264 months' imprisonment for Guojun. In doing so, the Court found that defendant Chaofan was the "architect" of a "sophisticated scheme to defraud BOC of enormous sums of money" and "played a significant part in encouraging others to become a part of the scheme to defraud." While Guojun was less culpable and had a lesser leadership role than defendant Chaofan or Zhendong Yu, the Court emphasized the importance of punishing individuals who commit crimes in foreign countries and then flee to the United States in order to avoid penalty for those crimes.

1 (RT [5/6/09] 80-81). The Court also imposed a \$482 million
2 restitution order, reflecting the loss to BOC.

3 C. The Appeal

4 Defendants appealed their convictions and sentences. In a
5 published opinion, the Ninth Circuit affirmed the convictions
6 but vacated the sentences and remanded for resentencing. The
7 Ninth Circuit initially rejected defendants' contention that the
8 2007 edition of the Sentencing Guidelines should not be applied
9 to their sentencings and noted that there was a "single RICO
10 conspiracy with two purposes: the Bank of China fraud and
11 immigration fraud." 706 F.3d at 989-91. The Ninth Circuit also
12 held that it was error to apply Guideline Section 2S1.1(a)(1) to
13 the sentencings, which calculates the base offense level upon
14 the offense level for the underlying offense, because "foreign
15 conduct cannot be used to meet the requirements" of the
16 Guideline. Id. at 992-93. The Ninth Circuit thus remanded for
17 sentencing under Section 2S1.1(a)(2), which applies a base
18 offense level of 8 plus the number of offense levels from the
19 Section 2B1.1 loss table corresponding to the value of the
20 laundered funds. Id.

21
22 The Court also rejected defendant Chaofan's objection to
23 the abuse of a position of trust enhancement under Section
24 3B1.3, but sustained the objection to the one-level enhancement
25 for a conviction for 18 U.S.C. § 1957 under Section
26 2S1.1(b)(2)(A). Id. at 993.
27
28

1 With regard to the restitution order, the Ninth Circuit
 2 held that the \$482 million figure was infirm in that a reference
 3 to Guideline calculations was not sufficient to support the
 4 restitution figure, since restitution must be based on actual
 5 loss. Id. at 994. The Ninth Circuit accordingly remanded for
 6 reconsideration of restitution (this issue is addressed in the
 7 government's concurrently filed resentencing position regarding
 8 restitution).

9
 10 **III. BASED ON THE FUNDS LAUNDERED OR ATTEMPTED TO BE LAUNDERED,**
 11 **THE OFFENSE LEVELS FOR DEFENDANTS CHAOFAN AND GUOJUN ARE 36**
 12 **AND 35, RESPECTIVELY**

13 The Ninth Circuit remanded for resentencing under Guideline
 14 Section 2S1.1(a)(2). Section 2S1.1(a)(2) provides a base
 15 offense level of 8 "plus the number of offenses from the table
 16 in § 2B1.1 . . . corresponding to the value of the laundered
 17 funds" "Laundered funds" is defined as "the property,
 18 funds, or monetary instrument involved in the transaction,
 19 financial transaction, monetary transaction, transportation,
 20 transfer, or transmission in violation of 18 U.S.C. § 1956 or
 21 § 1957." U.S.S.G. § 2S1.1, comment. (n.1). Given that the
 22 offenses of conviction included Count Two, money laundering
 23 conspiracy, which included both engaging in and attempting to
 24 engage in monetary transactions in fraud proceeds, it is
 25 appropriate to consider all transactions within the scope of the
 26 conspiracy, whether or not consummated.

27 The only limitation is the Ninth Circuit's ruling that
 28 "applying the relevant conduct analysis to Defendants' foreign

1 conduct is not permissible." 706 F.3d at 992. In doing so, the
2 Ninth Circuit relied on United States v. Azeem, 946 F.2d 13 (2d
3 Cir. 1991), in which the Second Circuit upheld the district
4 court's reliance on a kilogram of heroin imported from abroad
5 into New York for purposes of calculating a drug sentence, but
6 held that the "foreign crime" of a three-kilogram delivery from
7 Pakistan to Cairo, Egypt, should not be used. Azeem, 946 F.2d
8 at 17. The Ninth Circuit here elected to follow the Second
9 Circuit in Azeem. 706 F.3d at 993.

10 Similar to Azeem, defendants' conduct involved both
11 embezzled amounts that were transferred from one foreign
12 location to another foreign location, as well as amounts that
13 defendants transferred (or attempted to transfer) from overseas
14 into the United States. At trial, casino witnesses described
15 the business records that documented the trips from March 1999
16 to October 2001, which included the exhibits that documented the
17 checks and transfers that supported defendants' multi-million
18 dollar gambling activities. In addition, Zhen Dong Yu testified
19 to particular transfers and checks that the defendants sought to
20 bring and cause to be sent to the United States when the
21 defendants fled from China to this country. Those amounts that
22 defendants transferred or attempted to transfer to the United
23 States are summarized in the table in the concurrently filed
24 declaration of Ronald Cheng (at ¶ 4) and total over \$20 million,
25 which is reproduced below:
26

27 //
28

DATE	RECIPIENT	DESCRIPTION (ATTEMPTED TRANSFERS IN BOLD TYPE)	AMOUNT
03-02-99	Caesars Palace	Bank of China check H182363 for HKD 3,821,400.00 (at foreign exchange rate of 7.75 HKD = 1 USD) (Trial Exhibit 181(7), page BOC-14819)	\$493,083.87
09-29-00	Bellagio	Westpac check for AUD 500,000 (at foreign exchange rate of 1.791473 AUD = 1 USD) (Trial Exhibit 180(3), page BOC-15080)	\$279,100.00
09-30-00	Bellagio	Hua Chiao Commercial Bank check 50009484 (Trial Exhibits 180(3), page BOC-15080) and 180(5), page BOC-15078; source Ever Joint (RT [8/12/08 p.m.] 242-43); requested by Chaofan from Ever Joint as loan to Wah-Po Kwong, payable to Wong Hon Chee (RT [8/12/08 p.m.] 247-48) (Trial Exhibit 244, appendix XVIII.8)	\$500,000.00
09-30-00	Bellagio	Hua Chiao Commercial Bank checks 50009485 through 50009488 (four checks) (Trial Exhibit 180(2), page BOC-15064); requested by Chaofan from Ever Joint as loan to Wah-Po Kwong (Morris testimony; RT [8/12/08 p.m.] 246-47)	\$1,921,721.88
04-27-01	Caesars Palace	Shanghai Commercial Bank cashier's check (Trial Exhibit 181(21), page BOC-14888)	\$450,000.00

DATE	RECIPIENT	DESCRIPTION (ATTEMPTED TRANSFERS IN BOLD TYPE)	AMOUNT
04-27-01	Caesars Palace	Hang Seng Bank demand draft (Trial Exhibit 181(21), page BOC-14888)	\$450,000.00
05-07-01	Caesars Palace	Bank of America check 998 (Trial Exhibit 181(21), page BOC-14895)	\$1,000,000.00
05-23-01	Caesars Palace	Transmittal from Hong Kong (Trial Exhibit 181(21), page BOC-15141)	\$420,000
09-28-01	Caesars Palace	Bank of America transmittal of office deposits (Trial Exhibit 181(22), page BOC-14901)	\$1,000,000.00
10-06-01	Caesars Palace	Standard Chartered Bank Hong Kong draft (Trial Exhibit 181(22), page BOC-14490)	\$500,000.00
10-06-01	Caesars Palace	Standard Chartered Bank Hong Kong draft (Trial Exhibit 181(22), page BOC-14490)	\$500,000.00
10-06-01	Caesars Palace	Hua Chiao Commercial Bank draft (Trial Exhibit 181(22), page BOC-14490)	\$300,000.00
10-15-01	Desert Palace (Caesars Palace and Paris)	Zhen Dong Yu transfer for HKD 8,859,292 to Wong Hon Chee account at Desert Palace (at foreign exchange rate of 7.75 HKD = 1 USD) (Trial Exs. 181(23) and 244 (at appendix XVI.9)) (testimony of Rob Morris, RT [8/12/08 p.m.] 243-46)	\$1,141,661.34

DATE	RECIPIENT	DESCRIPTION (ATTEMPTED TRANSFERS IN BOLD TYPE)	AMOUNT
10-15-01	Desert Palace (Caesars Palace and Paris)	Guojun transfer for HKD 43,738,367 to Wong Hon Chee account at Desert Palace (at foreign exchange rate of 7.75 HKD = 1 USD) (Trial Exs. 181(23) and 244 (at appendix XVI.9)) (testimony of Rob Morris, RT [8/12/08 p.m.] 243-46)	\$5,636,387.50
10-15-01	Desert Palace (Caesars Palace and Paris)	Chaofan and Guojun transfer for HKD 1,349,400 to Wong Hon Chee account at Desert Palace (at foreign exchange rate of 7.75 HKD = 1 USD) (Trial Exs. 181(23) and 244 (at appendix XVI.9)) (testimony of Rob Morris, RT [8/12/08 p.m.] 243-46)	\$173,891.75
10-15-01	Desert Palace (Caesars Palace and Paris)	Chaofan transfer for HKD 13,000,000 to Desert Palace (at foreign exchange rate of 7.75 HKD = 1 USD) (Trial Exs. 181(23) and 244 (at appendix XVI.9)) (testimony of Rob Morris, RT [8/12/08 p.m.] 243-46)	\$1,675,257.73
10-15-01	Desert Palace (Caesars Palace and Paris)	Chaofan transfer for HKD 815,343 to Wong Hon Chee account at Desert Palace (at foreign exchange rate of 7.75 HKD = 1 USD) (Trial Exs. 181(23) and 244 (at appendix XVI.9)) (testimony of Rob	\$105,069.97

DATE	RECIPIENT	DESCRIPTION (ATTEMPTED TRANSFERS IN BOLD TYPE)	AMOUNT
		Morris, RT [8/12/08 p.m.] 243-46)	
approx. 10-15-01	Zhen Feng Yu in San Francisco (brother of Zhen Dong Yu)	Standard Chartered wire transfer (Trial Ex. 17) (testimony of James Bonich, RT [8/19/08 a.m.] 111-12)	\$1,553,000.00
approx. 10-15-01	Zhen Feng Yu in San Francisco (brother of Zhen Dong Yu)	Standard Chartered wire transfer (Trial Ex. 17) (testimony of James Bonich, RT [8/19/08 a.m.] 111-12)	\$2,000,000.00
TOTAL			\$20,099,174.04

As Zhen Dong Yu testified in the depositions played at trial, the money that Chaofan, Guojun, and Zhendong Yu had in Hong Kong were all from the funds embezzled from BOC (RT [9/20/05] 120-21). That is, the funds came from the Ever Joint Company in Hong Kong (RT [2/21/08] 94-95; RT [2/25/08] 189-90, 194). As Zhen Dong Yu testified, the funds for Ever Joint came from BOC loans that Chaofan, Guojun, and Zhendong Yu used without the authority of the borrowers or BOC. (RT [2/19/08] 28-31, 44-45, 51-59). Specifically, Ever Joint's funds were comprised of funds stolen from the BOC interbranch account, unauthorized use of customer information to obtain loans from BOC and transfer of the loan proceeds to Ever Joint, and underground currency transfers. (RT [2/19/08] 51-59).

The forensic analysis done on Ever Joint and the defendants' individual accounts in Hong Kong corroborated this

1 testimony. As the forensic accounting expert, Rob Morris,
2 testified, Ever Joint was simply a conduit for the transfer of
3 funds and, for the most part, did not conduct actual business.
4 (RT [8/12/08 p.m.] 196-97). Morris' analysis of receipts
5 related to business operations compared to total receipts showed
6 a ratio that began as high as 40% in 1994, but declined to 10%
7 in 1997. (Exs. 230, 234). Furthermore, remittances to Ever
8 Joint from China purported to state payment for equipment or
9 goods, but there was no documentation to that effect. Ever
10 Joint maintained large balances with the sub-branch, and despite
11 debit notes reflecting interest payments from Ever Joint to BOC
12 (which Morris' and a BOC auditor's testimony showed had indicia
13 of fraud), in fact Ever Joint's records did not show cash being
14 sent to BOC Kaiping except in one instance. (RT [7/1/08] 65-68;
15 [7/2/08] 57-58; [8/12/08 a.m.] 87-90, 100-01; [8/12/08 p.m.]
16 134-38, 165-70, 174-75, 178-81, 192-93; Exs. 231, 238, 239, 582-
17 590). So-called "remittance advices" stated that the funds came
18 out of the sub-branch, but in fact the funds came from the
19 accounts of Kaiping Polyester and other area companies. (RT
20 [8/12/08 p.m.] 195-96; Ex. 239). The defendant managers caused
21 false loans to be made in the names of local businesses and
22 diverted loans made to a subsidiary of Kaiping Polyester (Exs.
23 403(3), 557). Defendant Chaofan received from Ever Joint
24 payments of 1.7 billion Hong Kong dollars (or \$218 million) and
25
26

defendant Guojun received 290.9 million Hong Kong dollars (or \$37.3 million). (Ex. 239).

This evidence shows that the funds used or intended to be used in the United States were stolen directly or indirectly from the BOC Kaiping sub-branch, transferred to Ever Joint in Hong Kong, and then used as the basis for the funds sent to the United States. Based upon these amounts and the Ninth Circuit's opinion, the government submits the relevant Guideline calculations are as follows:

DESCRIPTION			LEVELS
Base for 2S1.1 (a)(2)	Base	8	30
	Loss (more than \$20 million) (\$ 2B1.1(b)(1)(L))	22	
	SUBTOTAL	30	
NET OFFENSE LEVEL (FOR DEFENDANTS KUANG AND YING YI YU)			30
Role			4 (Chaofan) / 3 (Guojun)
Abuse of position of trust			2 (Chaofan and Guojun)
NET OFFENSE LEVEL			36 (for Chaofan) /35 (for Guo Jun)

1 These calculations for defendants Kuang and Ying Yi Yu do
2 not affect the terms of imprisonment that they have served. An
3 offense level of 30 and criminal history category of I
4 corresponds to a range of 97 to 121, and the 96-month term
5 previously imposed is one month below the low end of this range.
6 The new ranges for defendants Chaofan and Guojun are lower than
7 the sentences previously imposed: for Chaofan, the applicable
8 range is 188 to 235 months, and for Guojun, the applicable range
9 is 168 to 210 months.

10 **IV. THE FACTORS UNDER 18 U.S.C. § 3553 SUPPORT THE ORIGINAL**
11 **SENTENCES IMPOSED THAT THIS COURT IMPOSED**

12 As established by Supreme Court's decisions in United
13 States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005), and well-
14 established caselaw in the Ninth Circuit, the Guidelines are
15 only one factor to take into account in the imposition of
16 sentence under 18 U.S.C. § 3553(a). The Ninth Circuit explained
17 the relevant procedure in United States v. Carty, 520 F.3d 984
18 (9th Cir. 2008) (en banc), in particular the relationship
19 between the Sentencing Guidelines and the factors described in
20 18 U.S.C. § 3553(a). To effectuate the goal of the Sentencing
21 Reform Act to "'impose a sentence, but not greater than
22 necessary' to reflect the seriousness of the offense, promote
23 respect for the law, and provide just punishment; to protect the
24 public; and to provide the defendant with needed educational or
25 vocational training, medical care, or other correctional

1 treatment," the Ninth Circuit explained that after determining
2 the applicable Guideline range and hearing from the parties:

3 The district court should then consider the [18
4 U.S.C.] § 3553(a) factors to decide if they support
5 the sentence suggested by the parties, i.e., it should
6 consider the nature and circumstances of the offense
7 and the history and characteristics of the defendant;
8 the need for the sentence imposed; the kinds of
9 sentences available; the kinds of sentence and the
10 sentencing guideline range established in the
11 Guidelines; any pertinent policy statement issued by
12 the Sentencing Commission; the need to avoid
13 unwarranted sentence disparities among defendants with
14 similar records who have been found guilty of similar
15 conduct; and the need to provide restitution to any
16 victims.

17
18 Id. at 991 (citing 18 U.S.C. § 3553(a)(1)-(7) and Gall v. United
19 States, 552 U.S. 38, 128 S. Ct. 586, 596-97 n.6 (2007)). The
20 Ninth Circuit also held that the sentencing court must support
21 any sentence outside the range by a justification, with "a major
22 departure supported by a more significant justification than a
23 minor one," and the sentencing court must explain the final
24 sentence "sufficiently to permit appellate review," depending
25 "upon the complexity of the particular case, whether the
26

sentence chosen is inside or outside of the Guidelines, and the strength and seriousness of the proffered reasons for imposing a sentence that differs from the Guidelines range." Carty, 520 F.3d at 991-92.

At the original sentencings, the Court granted the following downward variances for the defendants:

DEFENDANT	GUIDELINE RANGE	IMPRISONMENT TERM AFTER 18 U.S.C. § 3553 VARIANCE
Chaofan	65 years (based on a Guideline range of life imprisonment, which was capped at the statutory maximum)	25 years (or 300 months)
Guojun	65 years (based on a Guideline range of life imprisonment, which was capped at the statutory maximum)	22 years (or 264 months)
Wan Fang Kuang	324 to 405 months	8 years (96 months)
Ying Yi Yu	324 to 405 months	8 years (96 months)

For defendants Kuang and Ying Yi Yu, the recalculated range of 97 to 121 months is higher than the 8 years previously imposed, and, as discussed in the prior section, the government does not seek additional prison time for these defendants.

1 Accordingly, there need be no change in their terms of
2 imprisonment.

3 For defendants Chaofan and Guojun, the recalculated ranges
4 are lower than the terms originally imposed, and the government
5 requests the Court to reimpose the same terms of imprisonment
6 based upon consideration of the Section 3553(a) factors. The
7 first of those factors is the nature and circumstances of the
8 offense and the history and characteristics of the defendant.
9 18 U.S.C. § 3553(a)(1). As this Court noted at the original
10 sentencing, there must be a sanction to punish individuals who
11 commit crimes in foreign countries and flee to the United States
12 to avoid penalty for these crimes. (RT [5/6/09] 80-81). As the
13 Ninth Circuit noted, the goal of defendants' enterprise was "to
14 steal large sums of money from [BOC] and to get away with it in
15 the United States." 706 F.3d at 978-79. Defendants employed
16 the immigration fraud "to acquire the money and safely enjoy it
17 [in] the United States, beyond the reach of Chinese law." Id.

18 In doing so, defendants Chaofan and Guojun engaged numerous
19 individuals in the United States, including the six fake
20 spouses, the former sub-branch colleague Ding Hao who had moved
21 to San Francisco and who helped find some of the fake spouses, a
22 person in New York who performed a similar function in the case
23 of fake spouse Wai Kwong Ho, and the paralegal and lawyer at the
24 law firm in the Los Angeles area who helped arrange the
25 fraudulent marriages. There were elaborate measures taken to

1 execute the scheme, including the travel of the fake male
2 spouses from the United States to Kaiping, the staged
3 photographs in Kaiping and New York, the establishment of
4 fraudulent joint bank accounts, and the chartered plane flight
5 to the Los Angeles airport for fake marriages. In addition,
6 defendants' conspiracy included the falsification of marriage
7 records in China to conceal their true marriages and the
8 procurement of another BOC sub-branch official and a supervisory
9 civil administration official to prevail on the line-level
10 official, Huishi Chen, to either alter documents or let them
11 remove the documents from the local office. These
12 characteristics of what was a complex fraud scheme may properly
13 be considered for an upward variance. See United States v.
14 Orlando, 553 F.3d 1235, 1239 (9th Cir. 2009) (history of
15 involvement in complex fraud schemes supported upward variance).

16 There is a particular need for a variance here given the
17 need for the sentence "to reflect the seriousness of the
18 offense, to promote respect for the law, and to promote just
19 punishment for the offense." 18 U.S.C. § 3553(a)(2)(A) and (B).
20 The fact that defendants committed this fraud with the object to
21 enter the United States is also relevant because of the absence
22 of an extradition treaty between the United States and China.
23 The Ninth Circuit has noted that a defendant's knowledge of
24 extradition law to avoid capture is a relevant factor for an
25 upward variance, United States v. Lichtenberg, 631 F.3d 1021,

1 1027 (9th Cir.), cert. denied, 131 S. Ct. 2475 (2011), and the
2 analogous factor of defendants' attempt to avoid Chinese
3 prosecution by fleeing to the United States is similarly
4 relevant, given that it shows a special need to deter this
5 attempt to use the United States as a safe haven for fraudulent
6 activity by committing additional crimes in the United States.
7 In addition, defendants not only fled from China to the United
8 States, but also made efforts to conceal themselves within this
9 country by fleeing from the Los Angeles area to Kansas and
10 Oklahoma. Indeed, upon arrest, Chaofan after being handcuffed
11 tried to run away from law enforcement agents. These acts
12 further support a variance. Cf. United States v. Truong, 587
13 F.3d 1049, 1052 (9th Cir. 2009) (high-speed chase supported
14 upward variance).

15 There is also a need to avoid sentencing disparities. 18
16 U.S.C. § 3553(a)(6). The third sub-branch manager, Zhen Dong
17 Yu, received a 12-year sentence based upon his agreement, even
18 before the arrest of defendants here, to cooperate in this case
19 and to return to China to face prosecution there. Sentences for
20 Chaofan and Guojun within the recalculated Guideline ranges of
21 188 to 235 months (for Chaofan) or 168 to 210 months (for
22 Guojun) would not properly reflect the greater need for
23 punishment for these defendants given, in Chaofan's case, his
24 greater leadership role, and in the case of both defendants, the
25 additional efforts they took to conceal themselves within the

1 country and the absence of any acceptance of responsibility,
2 much less cooperation.

3 For these reasons, the government requests the Court to
4 impose the original sentences for Chaofan and Guojun based upon
5 the Section 3553(a) factors.

6 **V. CONCLUSION**

7 For these reasons, the government respectfully requests
8 that the Court reimpose the 25-year term of imprisonment on
9 defendant Chaofan, the 22-year term of imprisonment on defendant
10 Guojun, and the eight-year terms of imprisonment on defendants
11 Kuang and Ying Yi Yu. As stated in the government's submission
12 on restitution, the government requests the Court to impose
13 restitution to the Bank of China for \$7,813,905.75 with regard
14 to each defendant, with each defendant jointly and severally
15 liable with the other defendants.